STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

In the Matter of:

SHELBY TOWNSHIP,

Respondent/Appellant,

MSC Case No.: 153074
COA Case No.: 323491
MERC Case No.: C12 D-067

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,

Charging Party/Appellee.

_____/

RESPONDENT/APPELLANT SHELBY TOWNSHIP'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

This Court has jurisdiction to hear an appeal from the Court of Appeals. See MCR 7.303(B)(1) and MCL 600.215(3). Leave to appeal was granted on February 3, 2017. *Shelby Twp v Command Officers Assn of Michigan*, No. 153074, 889 NW2d 703 (2017).

STATEMENT OF QUESTIONS PRESENTED

A. Section 4 of Act 152 grants public employers the discretion to allocate the employees' share of total costs of its medical benefit plans among its employees "as it sees fit." Shelby Township allocated the employees' share without bargaining with the Union. Did it commit an unfair labor practice?

Shelby Township/Respondent/Appellant answers: No.

Union/Charging Party/Appellee will answer: Yes.

B. Act 152 limits what public employers may spend on health care for active employees. Blue Cross calculates premiums and illustrative rates that include retiree claims experience as part of its rate calculation. Does Act 152 regulate an insurance company's rate-calculation methodology to preclude retiree claims experience?

Shelby Township/Respondent/Appellant answers: No.

Union/Charging Party/Appellee will answer: Yes.

C. A public employer may not take unilateral action on a mandatory subject of bargaining. The Michigan Employment Relations Commission ruled that Shelby Township committed an unfair labor practice because it did not unilaterally recalculate and implement a revised illustrative rate under Act 152. Did the Commission err?

Shelby Township/Respondent/Appellant answers: Yes.

Union/Charging Party/Appellee will answer: No.

INTRODUCTION

In 2011, the Michigan Legislature enacted the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 as amended, MCL 15.561 *et seq*. ("Act 152"). Act 152 places limits on the amount public employers can pay toward employee medical benefits. It includes two limiting options for public employers. The first option uses a fixed dollar limit (i.e. "hard-cap"). MCL 15.563. The second option uses a percentage limit, which prohibits a public employer from paying more than 80% of the total annual costs of all of its employees and public officials medical benefit plans. MCL 15.564. The total annual costs under Section 4 include the premiums paid or illustrative rates for all medical benefit plans offered by the public employers, all public employer payments for employee reimbursements of co-pays and deductibles, and public employer contributions to health savings accounts.

This dispute arose when the Charter Township of Shelby ("Township") implemented the percentage limit under Section 4 of Act 152 without bargaining with the Command Officers Association of Michigan ("Union").[1] In response, the Union filed an unfair labor practice charge against the Township under the Public Employment Relations Act ("PERA"), MCL 423.201 *et seq*. The Union alleged that employers have a duty to bargain over mandatory subjects of bargaining, including, among other things, the choice between the hard-cap or percentage-limit, as well as the allocation of medical benefits plan costs under Act 152.

The Michigan Employment Relations Commission ("Commission") held that while the plain language of Act 152 reserved the choice between implementing Sections 3's hard-cap or Section 4's percentage limit to the public employer's discretion,[2] public employers must still

[1] During the course of these proceedings, the Shelby Township Command Officers Association replaced the Command Officers Association of Michigan as the "Union."

[2] This issue was not appealed by the Union to the court of appeals.

bargain over the allocation of medical benefits plan costs because PERA requires collective bargaining on issues pertaining to health insurance. The court of appeals summarily affirmed the Commission's decision without review or analysis of the applicable statutory language. The court of appeals' disregard of the statutory text, which expressly stated that public employers retained complete discretion to allocate their costs under Act 152, is the primary error below. As addressed herein, the text of Act 152 exempts the allocation and calculation of the payments of medical benefit plan costs from collective bargaining.

The court of appeals also held that a self-insured public employer could not rely on the illustrative rates provided by its insurance company if the rates included retiree claims experience. The purpose of Act 152, however, was to limit *a public employer's expenditures on active employee health care*; the health care of retirees is unaffected by Act 152. Neither Act 152, nor PERA, preclude the use of illustrative rates that factor in retiree claims experience. It was error to hold the Township liable under PERA for violating Act 152, where Act 152 is entirely silent as to the methodology of an insurance company's calculation of illustrative rates.

Finally, the Commission held that the Township's failure to unilaterally recalculate and implement a revised illustrative rate under Act 152 without bargaining constituted an unfair labor practice. Regardless of whether the issue is a mandatory subject of bargaining, this ruling reversed well settled precedent of the Commission and this Court. Worse still, the Commission failed to provide any rationale for this divergence despite controlling caselaw mandating such an explanation. This Court should clarify that public employers are not required to unilaterally improve or reduce employee benefits without a prior order of the Commission or other court and that the failure to take such action is not an unfair labor practice.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Township and Union were parties to a collective bargaining agreement, effective January 1, 2005 through December 31, 2010. (**JA 34a**). To arrive at the terms for a successor collective bargaining agreement, the parties met for bargaining numerous times beginning in early 2011. (**JA 37a, Tr., p. 20:14-21**). In negotiations for a successor agreement, the parties discussed health care plans, deductibles and co-pays, in addition to discussing other terms for the new collective bargaining agreement. (**JA 38a, Tr., pp. 22:4-8; 22:13-22**).

A. The Michigan Legislature adopts Public Acts 54 and 152 of 2011.

While the parties continued to negotiate the terms for the new labor contract, the Michigan Legislature enacted Public Acts 54 and 152 of 2011.[3] Act 152 places limitations ("caps") upon the costs of employee health care benefits paid by public employers. Section 3 of Act 152, MCL 15.563, sets a specific dollar limit on the amount a public employer may contribute to a medical benefit plan for its employees or elected officials for a medical benefit plan coverage year beginning on or after January 1, 2012. Section 4 of Act 15 MCL 15.564, permits a public employer, by a majority vote of its governing board, to select a plan whereby the public employer pays no more than 80% of the total annual costs of its medical benefit plans.[4] Local units of government, as defined by Act 152, may also choose to exempt themselves from Act 152's requirements for the next succeeding year by a two-thirds vote of the governing body. MCL 15.568(1). Under Section 5 of Act 152, MCL 15.565, Section 3 and 4's requirements were not applicable to public employees subject to a collective bargaining

[3] Amendments to Act 152, 2013 Public Acts 269 through 273 and 2014 Public Act 184, were also passed by the Michigan Legislature and effective on December 30, 2013 and June 20, 2014, while this matter was pending with the Commission. The issues on appeal however are unaffected by the amendments to Act 152.

[4] Section 4 of Act 15.564 is also referred to as the "80/20 percentage" requirement option.

agreement or other contract, which was in effect prior to September 27, 2011 until expiration of the contract. Public employers that fail to comply with Act 152 are subject to financial penalties under Section 9. MCL 15.569.

Public Act 54 of 2011, MCL 423.215b ("Act 54"), is an amendment to the PERA, and was enacted on June 8, 2011.[5] Under Act 54, a public employer pays wages or benefits at levels and amounts which are no greater than those in effect upon expiration of a collective bargaining agreement.[6] Act 54 thereby requires that public employees pay the insurance premium increases for health care benefits to the extent that the increases occur after the expiration of the collective bargaining agreement. MCL 423.215b(1), (4)(b).

B. The Township's Notification Regarding its Upcoming Implementation of Acts 152 and 54 of 2011

On or about November 21, 2011, Township Human Resources Director Lisa Suida notified the Union's members of open enrollment for the Township's insurance plans for the

[5] On October 15, 2014, the Michigan Legislature enacted Public Act 322 of 2014, an amendment to Act 54. Act 322 exempts public safety employees who are eligible to participate in Act 312 arbitration from Act 54's mandates. At the time of the Township's implementation of Act 54, Act 54's requirements applied to public safety employees who were eligible to participate in Act 312 arbitration, including the Union's bargaining unit members.

[6] Act 54, Section 1 states, in relevant part, as follows:

> … [A]fter the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date. The public employer is authorized to make payroll deductions necessary to pay the increased costs of maintaining those benefits. 2011 PA 54, MCL 423.215b(1)

upcoming 2012 calendar year. (**Ja 108a**).[7] During the open enrollment period of November 28 through December 8, 2011, Township employees were able to:

(1) Opt into or out of health insurance coverage;

(2) Submit changes, additions, or deletions to current insurance coverage;

(3) Opt into, out of, or make changes to AFLAC insurance; or

(4) Elect to change 457 providers from Nationwide to John Hancock. (**JA 108a**).

Any changes selected during this period became effective January 1, 2012. (**JA 54a, Tr., p. 89:19-22; JA 108a**).

The November 21, 2011 correspondence from Ms. Suida also informed the Union's members of the impending employee cost share pursuant to Sections 3 or 4 of Act 152 to commence January 1, 2012 as well as Act 54's requirements, which would be effective February 1, 2012. (**JA 54a, Tr., pp. 89:23-90:2; JA 108a**). Ms. Suida informed the Command Officers, in pertinent part, as follows:

> On September 24, 2011, 2011 Senate Bill 7 was approved by the Governor and became Public Act 152, the publicly funded health insurance contribution act. The act limits contributions by the Township toward employee health care costs and applies to those collective bargaining agreements executed on or after September 15, 2011. As per the Public Act, the Shelby Township Board of Trustees will vote in December whether to opt out, to utilize the hard caps or to execute the 80/20 option in 2012. Based on that vote the following costs will be applied effective January 1, 2012:

80/20	JAN 1, 2012	FEB 1, 2012 (w/o new CBA)	FEB 1, 2012 (w/ new CBA)
Single	$86.92	$120.07	$93.55
2-person	$208.62	$288.16	$224.33
Family	$260.77	$360.20	$280.66

[7] Ms. Suida testified that the 2012 open enrollment period was for all Township employees who received Township-provided health care coverage. (**JA 54a, Tr., p. 88:4-7**).

HARD CAP	JAN 1, 2012	FEB 1, 2012 (w/o new CBA)	FEB 1, 2012 (w/ new CBA)
Single	$22.11	$55.25	$55.25
2-person	$53.05	$132.59	$132.59
Family	$66.32	$165.74	$165.74

> In addition to Public Act 152, Public Act 54 asserts that any increases in the cost of health care, are the responsibility of the employee, until the successor collective bargaining agreement is in effect. Increases to the cost of the Township's insurance plan on February 1, 2012 account for the cost share on that date. (**JA 108a-109a**).

On November 22, 2011, the Union's General Counsel Frank Guido wrote a letter to Ms. Suida, addressing a rumor regarding Township's implementation of Act 152. (**JA 40a, Tr., pp. 30:16-31:4**). The November 22, 2011 letter from Mr. Guido stated, in part, as follows:

> Mr. Kevin Loftis has stated that it is the opinion of the Township that they are allowed to not only impose the provisions of P.A. 152 upon the COA bargaining unit at this time but, in addition, that the Township is at liberty to utilize the different formats under the statute, "hard caps" and "80%", with different employee groups within the Township.
>
> It is the opinion of the Command Officers Association of Michigan, that the Township's interpretation of P.A. 152 is incorrect… (**JA 71a-72a**).

In a December 1, 2011 letter from Township's Labor Counsel, Craig W. Lange, to Mr. Guido, Mr. Lange wrote, in relevant part, as follows:

> …Contrary to the information you apparently have been provided, the Township has made no decision yet as to what premium sharing arrangements will be implemented pursuant to PA 152 of 2011. Nor, for that matter has the Township ever opined to Mr. Loftis that it may impose different cap formats under the statute with different employee groups.
>
> I have, however, informed Mr. Loftis of the Township's intention to act upon PA 152's provisions, whether by means of opting out or applying the caps as set forth in either Section 3 or Section 4, prior to the end of the calendar year. As you know, premium sharing is to begin, absent a Community's decision to opt out, after January 1, 2012. (**JA 74a**).

Subsequently, at its December 6, 2011 Meeting, a Motion was passed by the Township Board of Trustees, which stated:

> [T]o elect to comply with Section four of Public Act 152 and pay no more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials for a medical benefit plan coverage year beginning on or after January 1, 2012. (**JA 30a; JA 51a, Tr., p. 74:9-14**).

C. The Township's Implementation of Public Act 152 on January 1, 2012

Public employers have two ways to be insured. The first way is "fully insured." When a public employer is fully insured the insurance provider bears the risk of providing health insurance coverage and charges the public employer premiums to cover that risk. The second option is to be "self-insured," or sometimes called "self-funded." In a self-insured plan, the organization assumes the risk by paying for the majority of the health claims themselves.

The Township is self-insured with Blue Cross Blue Shield of Michigan ("Blue Cross") for its health insurance plans. (**JA 52a, Tr., pp. 78:25-79:9**). The Township thus does not pay actual premiums. (**JA 52a, Tr., p. 79:3-4**). The Township directly pays its employees' insurance claims subject to catastrophic coverage.

Blue Cross administers the Township's insurance program. Because the Township does not pay actual premiums, the Township receives "illustrative rates" which are prepared by Blue Cross. (**JA 52a, Tr., pp. 79:5-9; 93:8-9**). The illustrative rates take the place of actual premium rates for self-insured plans. (**JA 52a, Tr., pp. 78:25-79:6**). The illustrative rates are based upon several factors, including the Township's claim experience, fixed fees and census data. (**JA 61a, Tr., p. 115:1-19**). Illustrative rates are calculated annually. Blue Cross has historically calculated one composite illustrative rate for active employees and retirees for the self-insurance plans it administers. (**JA 57a, Tr., p. 99:2-10**).

On behalf of the Township, Cornerstone Municipal Advisory Group[8] received Blue Cross's calculation of the illustrative rate for the Township prior to November 21, 2011. (**JA 57a, Tr., pp. 100:21-101:9**). As it had historically, Blue Cross calculated a single illustrative rate for the Township that included both active employee and retiree claims experience. (**JA 61a, Tr., pp. 116:19-117:4**). These rates were then published to the Union's members in the November 21, 2011 correspondence from Ms. Suida. (**JA 108a-109a**).

Beginning on January 1, 2012, the Township implemented the percentage limit at Section 4, of Act 152. In so doing, the Township implemented the Blue Cross illustrative rate provided to it by Cornerstone and set forth in Ms. Suida's November 21, 2011 correspondence. (**JA 50a, Tr., p. 70:12-15**). The two union groups as well as elected officials paid a pure twenty percent (20%) of the illustrative rate applicable to their respective health care plan's illustrative rates.[9] (**JA 47a, Tr., pp. 59:13-20; JA 48a, 62:17-19; JA 52a, 78:10-16**). The monthly employee share of the illustrative rate under Act 152 for the Union's bargaining unit members, as of January 1, 2012, was: $86.92 for single coverage/$208.62 for two-person coverage/$260.77 for family coverage. (**JA 108a-109a**).

D. The Union's Response to the Township's Implementation of Act 152

Mr. Loftis, business representative for the Union, admitted that he knew of the Township Board's December 6, 2011 Resolution that adopted the 80/20 percentage requirement option pursuant to Act 152, Section 4 because he watched the televised portion of the meeting when it

[8] Cornerstone Municipal Advisory Group is a benefits consulting group for municipalities in southeastern Michigan which provides assistance on health and welfare benefit administration. (**JA 56a, Tr., p. 97:10-13**).

[9] The Township has seven bargaining units. The non-supervisory police officers, UAW general employees, UAW supervisory employees, court employees, and firefighters all had labor contracts in effect through the 2012 calendar year. (**JA 52a, Tr., p. 79:22-80:20**). Under Section 5(1) of Act 152, these Township employees were exempt from the employee premium share requirements until the expiration of their respective labor contract. MCL 15.565(1). Additionally, the Township's Department Heads had an agreement in effect, and thus were not subject to Act 152's employee premium sharing mandates on January 1, 2012. (**JA 52a, Tr., pp. 80:24-81:7; 82:8-16**).

was passed. (**JA 50a, Tr., pp. 73:15-74:1**). Additionally, Mr. Loftis stated that the parties met with a State mediator on December 13, 2011 for purposes of labor negotiations and discussed the correspondences from their respective counsel regarding Act 152. (**JA 37a, Tr., p. 37:13-17**). Nevertheless, the Union waited until January 6, 2012, five days after the Township's implementation of Act 152, to demand that the Township bargain regarding "the calculation method and total amount of the employee contribution." (**JA 76a**). This letter from Mr. Loftis, however, was both written and received *after* the Township had already implemented the 80/20 percentage limit under Section 4 of Act 152.

Mr. Loftis testified that the parties met and bargained collectively in January 2012, after the Township's implementation of Section 4 of Act 152. (**JA 50a, Tr., p. 71:22-25**). On January 13, 2012, Mr. Loftis and some of the Command Officers met with Ms. Suida and a representative of Cornerstone Municipal Advisory Group, John Vance, to discuss various health care plans and premium share costs. (**JA 44a, Tr., pp. 47:25-48:11**). At the meeting, a handout was circulated that contained Blue Cross's November 2011 rates as implemented on January 1, 2012. (**JA 78a-83a**). It also included an unofficial, preliminary calculation of an illustrative rate that carved out the active employees' health care claims experience from the retirees' health care claims experience. (**JA 79a**). It is undisputed that these new illustrative rates were marked "Preliminary – Not Final" and were not a usable rate to be implemented. (**JA 82a-83a; JA 62a, Tr., pp. 119:16-120:6**). The record is also clear that the Township used the only illustrative rates available to it when it implemented Section 4 or Act 152 on January 1, 2012. (**JA 61a, Tr., pp. 116:19-117:9**).

Indeed, a single, composite rate for active and retired employees claim experience was all that existed before January 12, 2012. At that time, Blue Cross was only beginning to test its

capabilities to calculate illustrative rates using new actuarial techniques that separate active and retiree claims experience. (**JA 57a-58a, Tr., pp. 101:24-103:6**). To this end, Mr. Vance testified that his other municipal clients who implemented Act 152's percentage limit option also used a single, composite rate that included active and retiree claims experience. (**JA 61a-62a, Tr., pp. 117:23-118:16**). As of the date of the hearing, Blue Cross itself could not separate premium rates for active and retired employees for its fully insured public employers. (**JA 59a, Tr., p. 109:14-25**).

On or about January 19, 2012, the Township and the Union met again to negotiate the terms of the new labor contract; the negotiation was memorialized in writing. (**JA 69a**). During the entirety of the parties' negotiations for a successor labor contract, the parties discussed alternative health care plans as an effort to reduce the premiums that the Union's members had to pay under Act 152. (**JA 49a, Tr., p. 66:13-19**). However, the parties were unable to agree on a package which covered all of the outstanding issues. (**JA 49a, Tr., p. 66:20-23**).

E. The Township's Implementation of Act 54 on February 1, 2012

On February 1, 2012, there was an increase in the health care premium rates for the Township. (**JA 59a, Tr., pp. 107:24-108:6**). Act 54 required at the time that any increases in insurance premiums after contract expiration be paid by union members until contract settlement. MCL 423.215b. Pursuant to Act 54, the Township passed on these premium increases to the Union's members since the labor contract was expired. (**JA 59a, Tr., pp. 107:24-108:6**).

The amount of these increases was exactly as set forth in Ms. Suida's November 21, 2011 correspondence to members of the Union and based upon the illustrative rate provided to the Township by Blue Cross. Blue Cross increased illustrative rates by $33.15 for single coverage/$79.54 for two-person coverage/$99.43 for family coverage. (**JA 108a**). Application

of Act 54 and Act 152's statutory requirements resulted in a total monthly employee contribution for Union members of: $120.07 for single coverage/$288.16 for two-person coverage/$360.20 for family coverage. (**JA 46a, Tr., p. 57:2-6; JA 108a**).

F. The Union's Filing of An Unfair Labor Practice Charge and Relevant Procedural History

On or around April 3, 2012, the Union filed an unfair labor practice charge against the Township. The Charge contained four (4) alleged violations of PERA. The Union claimed the following:

(1) The Township had unilaterally implemented Section 4 of Act 152 on January 1, 2012, prior to the medical benefit plan coverage renewal on February 1, 2012;

(2) The Township's unilateral action in implementing a 20% employee premium sharing of medical insurance costs pursuant to Act 54 constituted impermissible stacking on Union bargaining unit members in excess of that recognized under Act 54 and Act 152;

(3) The Township failed to impose the same premium share on non-union employees that it imposed on Union bargaining unit members; and

(4) The Township's unilateral implementation of employee premium sharing based on impermissible calculations violated Act 152 and PERA. (**JA 2a-8a**).

The Union claimed these actions constituted unfair labor practices within the meaning of Sections 9, 10(1)(c) and (e), and 15 of PERA, MCL 423.209, 423.210(1)(c) and (e), and 423.215. (**JA 2a-8a**).

A hearing regarding the unfair labor practice allegations was held on July 17, 2012 before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System for the Commission. On May 31, 2013, Administrative Law Judge Julia C. Stern issued her Decision

and Recommended Order with regard to his matter. (**JA 171a**). Therein, the Administrative Law Judge concluded as follows:

(1) While the Township would normally have had a duty to bargain under PERA over the Township's selection of the hard cap option or 80/20 percentage option to comply with Act 152's premium sharing requirements, the Union did not make a demand to bargain over this issue and, as such, waived the right to bargain over it prior to January 1, 2012. (**JA 182a**).

(2) The Township's decision to implement Act 152's premium share requirements on January 1, 2012 did not violate its duty to bargain under PERA. (**JA 188a**).

(3) The Union's January 6, 2012 demand to bargain over the calculation and total amount of employee contributions was timely. (**JA 183a**). Administrative Law Judge Stern further concluded that a public employer, upon receiving an appropriate demand, has a duty to bargain under PERA over any aspect of its implementation of the Act 152 premium share that Act 152 leaves to its discretion. (**JA 185a-188a**). Administrative Law Judge Stern found that the Township failed to do so. (**JA 188a**).

(4) The Township did not violate its duty to bargain or discriminate against the Union under PERA by exempting its Department Heads from Act 152's employee premium share requirements. (**JA 189a**).

(5) The Township's failure to recalculate the employee premium share pursuant to Act 152, Section 4 so as to use an "unbundled" illustrative rate after its implementation on January 1, 2012 was contrary to Act 152 and a violation of its duty to bargain under PERA. (**JA 190a**).

(6) The Township violated its duty to bargain under PERA when it passed the increased premium costs for maintaining the Union bargaining unit members' health care coverage pursuant to Act 54 to the members and thereby increased the employees' premium share to greater than 20% of the total cost of their health care plan. (**JA 191a**).

On or about July 24, 2012, the Township filed Exceptions to the adverse portions of the Decision of the Administrative Law Judge Decision and Recommended Order, a Brief in Support of the Exceptions and a Request for Oral Argument with the Michigan Employment Relations

Commission. (**JA 198a-250a**). Specifically, the Township filed exceptions to the following aspects of the Administrative Law Judge's Decision and Recommended Order:

(1) The Union's January 6, 2012 demand was not untimely;

(2) A public employer's decision regarding the calculation and allocation of the employee share of health care costs pursuant to Section 4 of Act 152 constitutes a mandatory subject of bargaining;

(3) The Township refused to bargain over the calculation and allocation of the employee share of health care costs after the January 6, 2012 bargaining demand;

(4) The Township's use of a Blue Cross's illustrative rate, that included a retiree claims experience component, to calculate the employees' share of health care costs is contrary to Act 152;

(5) The Township violated its bargaining obligations under PERA because it did not recalculate the employee share of health care costs pursuant to Act 152 after its implementation on January 1, 2012; and

(6) The Township violated PERA because it raised the bargaining unit members' share of health care costs above 20% when it implemented Act 54's premium share increases.

The Union filed a Brief in Support of the Administrative Law Judge's Decision and Recommended Order on August 2, 2013. (**JA 252a-257a**). The Township filed a Motion for Leave to File a Supplemental Brief in Support of Exceptions to the Decision and Recommended Order of Administrative Law Judge Stern and its Proposed Supplemental Brief on September 19 and 23, 2013, respectively. (**JA 259a-262a**). The Township's Motion and Supplemental Brief requested that the Commission consider the "Frequently Asked Questions" regarding Act 152 issued by the Michigan Department of Treasury and published on August 28, 2013. (**JA 263a-293a**). The Union filed its Response on or about September 26, 2013. (**JA 297a-302a**).

On or about August 18, 2014, the Commission issued its Decision and Order, reversing in part and affirming in part the Administrative Law Judge's Decision and Recommended Order. (**JA 304a-317a**). The Commission found merit in the Township's exceptions that the Administrative

Law Judge erred by finding that (1) the Township refused to bargain over the calculation and allocation of the employee share of health care costs after receiving the Union's January 6, 2012 bargaining demand (Exception 3); and that (2) the Township breached its duty to bargain when it implemented the premium share increases in bargaining unit members' share of health care costs pursuant to Act 54. (Exception 6). (**JA 309a; 315a**).

The Commission nevertheless agreed with the Administrative Law Judge's findings that the Union's January 6, 2012 bargaining demand was timely.[10] (Exception 1). (**JA 309a**). Further, the Commission determined that the calculation and allocation of the employee share under Section 4 of Act 152 is a mandatory subject of bargaining. (Exception 2). (**JA 309a-311a**). The Commission further agreed with the Administrative Law Judge that the Township's actions in unilaterally requiring the Union's bargaining unit members to pay a premium share calculated on the basis of an illustrative rate that included retiree claims experience is impermissible under Act 152 and in violation of PERA. (Exception 4). (**JA 312a-313a**). According to the Commission, once the Township became aware of an illustrative rate that did not contain a retiree cost component, the Township should have unilaterally recalculated and implemented a revised illustrative rate. (Exception 4). (**JA 313a**). Its failure to do so constituted an unfair labor practice. **(JA 313a)**. Finally, the Commission held that the Township breached its duty to bargain by unilaterally implementing an increase in the employee share of the health care costs on February 1, 2012 pursuant to Act 54 based upon an increase in the illustrative rate, which included, as a factor in its calculation, retiree claims experience. (Exception 5). (**JA 313a-315a**).

Having determined that the Township had violated PERA, the Commission issued an Order requiring that the Township cease and desist from unilaterally changing terms and conditions of

[10] The issue of timeliness of the Union's bargaining demand was subsequently rendered moot by the Commission's Decision that, even if timely, the Township never refused to bargain with the Union. (**JA 309a**).

employment by requiring Union bargaining unit members to pay their employee benefit share based on an illustrative rate that included retiree claims experience. (**JA 316a-317a**). It also required that the Township recalculate the employee share for the time periods of January 1, 2012 through January 31, 2012 and February 1, 2012 through June 28, 2013, the date of the Arbitration Award and Opinion pursuant to Public Act 312 of 1969, as amended, MCL 423.231 *et seq*., and compensate the Union bargaining unit members for any overpayment including interest at the statutory rate of 5.00% per year. *Id.*

On or about September 5, 2014, the Township timely filed a Claim of Appeal as of Right pursuant to MCL 423.216(e) with the Michigan Court of Appeals. On December 15, 2015, in a four-page, unpublished opinion (**JA 489a-492a**), the Court of Appeals relied on the statutory interpretations of the Commission and obiter dicta from *Van Buren Co Ed Ass'n & Decatur Ed Support Pers Ass'n, MEA/NEA v Decatur Pub Sch*, 309 Mich App 630; 872 NW2d 710 (2015), holding:

(1) the percentage allocation of premium contributions under Act 152 is a mandatory subject of bargaining under PERA (**JA 490a-491a**);

(2) The Commission has the authority to interpret Act 152 and its interpretation of Act 152 trumps the Department of Treasury's interpretation (**JA 491a**);

(3) The Commission did not err when it determined that Act 152 prohibits the Township from using bundled illustrated rates in determining its employees' premiums (**JA 491a**); and

(4) The Township abandoned its argument that the Commission improperly ordered it to recalculate its premiums without bargaining with the Union. (**JA 491a-492a**)

The Township timely filed its application for leave of appeal to this Court. Following a September 21, 2016 Order directing the Union to answer the Township's Application for Leave to Appeal, this Court granted leave to appeal on February 3, 2017.

STANDARD OF REVIEW

A Decision and Order of the Commission is reviewed pursuant Const 1963, Art VI, § 28, and MCL 423.216(e). *Grandville Mun Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). This Court reviews the Commission's legal rulings *de novo*. *See Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 357, n. 8; 616 NW2d 677 (2000). Interpretation of a statutory provision is reviewed *de novo*. *Twp of Casco v Secy of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). Factual findings of the Commission are conclusive if supported by competent, material, and substantial evidence on the record. MCL 423.216(e).

ARGUMENT

I. The allocation of the costs of medical benefit plans under Act 152 is not a mandatory subject of bargaining.

Under PERA, a public employer and representatives of its employees shall bargain with "respect to wages, hours, and other terms and conditions of employment," which constitute mandatory subjects of bargaining. MCL 423.215. In general, health insurance benefits are considered "wages, hours, and other terms and conditions of employment," so they are a mandatory subject of bargaining. *St Clair Intermediate Sch Dist v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 551; 581 NW2d 707 (1998).

Once a subject is classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject if either party has proposed it, and neither party may take unilateral action on the subject absent an impasse in the negotiations. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 54-55; 214 NW2d 803 (1974).

Some employment related topics, however, are not classified as mandatory subjects of bargaining. Instead, they are classified as either permissive or prohibited subjects of bargaining.

A permissive subject of bargaining falls outside of the phrase "wages, hours, and other terms and conditions of employment," but nevertheless has some connection to the labor–management relationship. *Detroit Police Officers*, 391 Mich at 54–55. Permissive subjects of bargaining, however, lie within the entrepreneurial control of the public employer. See *Metro Council No 23 & Local 1277, of Am Fedn of State, Co & Mun Employees (AFSCME) AFL-CIO v City of Ctr Line*, 414 Mich 642, 656; 327 NW2d 822 (1982) (citing *Fibreboard Paper Products Corp v NLRB*, 379 US 203, 223 (1964) (Stewart, J, concurring) ("Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial

decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."); see also *Bay City Ed Ass'n v Bay City Pub Sch*, 430 Mich 370, 384; 422 NW2d 504 (1988) (holding that the board's decision to terminate its operation of the special education center programs was an educational policy decision within its managerial discretion and was not a "term and condition of employment" subject to the duty to bargain under § 15 of the PERA). Parties may bargain by mutual agreement upon a permissive subject, but neither side may insist on bargaining to a point of impasse. *Detroit Police Officers*, 391 Mich at 54–55. A public employer may act unilaterally upon a permissive subject without bargaining.

In contrast, prohibited (i.e. illegal) subjects of bargaining are provisions, such as a closed shop provision, or those provisions delineated under MCL 423.15(3), are unlawful under PERA or other statutes. Parties are not forbidden from discussing prohibited subjects of bargaining, but a contract provision embodying a prohibited subject is unenforceable. *Detroit Police Officers*, 391 Mich at 54–55.

The issue in this matter is whether a public employer is required to bargain over the allocation of the employees' share of the total annual costs of the medical benefit plans among employees. In other words, is such allocation a mandatory subject of bargaining?

Based on the language of Act 152 and specifically MCL 15.564, the reference allocation should not be a mandatory subject of bargaining. The final sentence of MCL 15.564(2)

expressly reserves discretion to the public employer to allocate its employees' medical benefit plan costs "as it sees fit."[11] MCL 15.564(2) states in full:

> For medical benefit plan coverage years beginning on or after January 1, 2012, a public employer shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials. For purposes of this subsection, total annual costs includes the premium or illustrative rate of the medical benefit plan and all employer payments for reimbursement of co-pays, deductibles, and payments into health savings accounts, flexible spending accounts, or similar accounts used for health care but does not include beneficiary-paid copayments, coinsurance, deductibles, other out-of-pocket expenses, other service-related fees that are assessed to the coverage beneficiary, or beneficiary payments into health savings accounts, flexible spending accounts, or similar accounts used for health care. For purposes of this section, each elected public official who participates in a medical benefit plan offered by a public employer shall be required to pay 20% or more of the total annual costs of that plan. *The public employer may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit.* (Emphasis added).

This provision exempts public employers from the general rule under PERA that public employers and employees must collectively bargain over all aspects of medical benefit insurance and costs. To this end, "[i]t is well accepted that when two legislative enactments seemingly conflict, the specific provision prevails over the more general provision." *Ter Beek v City of Wyoming*, 495 Mich 1, 22; 846 NW2d 531, 542–43 (2014). Thus, Act 152 also controls and diminishes PERA *pro tanto* to the extent the statutory subject matter overlaps.

This Court should reverse the court of appeals where its holding is inconsistent with the text of Act 152 and diminishes Act 152 in favor of PERA in contravention of statutory interpretation canons.

[11] Similar language is found in Section 3 concerning the calculation and allocation of the Act 152's hard cap option. It states, in part, that "…[a] public employer may allocate its payments for medical benefit plan costs among its employees and elected public officials as it sees fit…" MCL 15.563(1).

A. *The plain language of MCL 15.564(2) exempts the allocation of medical benefit plan costs from mandatory bargaining under PERA*.

This case turns on the interpretation and application of statutes. The critical question is whether MCL 15.564 exempts public employers from their general duty under MCL 423.215(1) to bargain collectively over certain terms and conditions of employment – here, the allocation of the "total annual costs of the medical benefit plans" among its employees.

In interpreting any statute, this Court's goal is to give effect to the Legislature's intent, focusing first on the statute's plain language. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016) (citation omitted). "In doing so, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Id*. "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id*. In *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) (citations omitted), this Court further explained, "[w]henever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory." Where statutory words or phrases are not defined, those words and phrases must be given their plain and ordinary meaning. *W Michigan Univ Bd of Control v State*, 455 Mich 531, 539; 565 NW2d 828 (1997).

Here, the final sentence of MCL 15.564(2) controls and leaves no room for interpretation. First, the use of the idiomatic phrase "as it sees fit" confers complete discretion to a public employer in determining the allocation of the employees' share of total annual costs. On many occasions this Court has identified that the phrase "as it sees fit" grants *complete discretion*.[12]

[12] "It is well established that the Legislature is free to define terms ***as it sees fit***." *People v Bonilla-Machado*, 489 Mich 412, 433-34; 803 NW2d 217 (2011) (emphasis added); *Attorney Gen v Perkins*, 73 Mich 303, 318; 41 NW 426 (1889) (use of the phase "as it sees fit" affords complete legislative discretion, subject only to the limitations of the constitution); *Apsey*, 477 Mich at 131 (the Court is bound to honor the choices of the Legislature, which has "the power to enact laws to function and interact ***as it sees fit***." (emphasis added)); *In re Request for Advisory Opinion*

Under *Ronnisch*, a plain reading of the statute leaves no doubt as to the meaning expressed therein – namely, the public employer has complete discretion to allocate its medical benefit costs among its employees.

Second, in this sentence, the direct object being "allocate[d]" by this sentence is "the employees' share of total annual costs of the medical benefit plans." The next clause identifies to whom the allocation impacts by using the preposition "among" and an indirect object, "the employees of the public employer," to describe recipients of the allocation. Most significantly, this sentence concludes by expressly describing how the allocation should occur – as the public employer "sees fit."

Third, the penultimate sentence in MCL 15.564(2) further supports the conclusion that the phrase "as it sees fit" in the subsequent sentence confers complete discretion in the public employer. It provides:

> For purposes of this section, each elected public official who participates in a medical benefit plan offered by a public employer shall be required to pay 20% or more of the total annual costs of *that plan*. (Emphasis added).

Stated differently, the public employer lacks the power to allocate the annual costs of a public official's plan. Public officials *must* pay "20% or more" of the costs of *their* plan.[13] The lack of

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Regarding Constitutionality of 2011 PA 38, 490 Mich 295, 349; 806 NW2d 683 (2011) (use of the phase "as it sees fit" affords complete legislative discretion, subject only to the limitations of the state and federal constitutions); *Michigan Dept of Nat. Res v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 388; 699 NW2d 272 (2005) (using "as it sees fit" to indicate that a property owner has complete discretion to restrict uses of his or her property); *Richardson v Jackson Co*, 432 Mich 377, 393; 443 NW2d 105 (1989) (quoting *City of Trenton v New Jersey*, 262 US 182, 187 (1923), where the U.S. Supreme Court used the phrase "as it sees fit" to define "legislative prerogative" in a manner that connotes complete and unfettered discretion).

[13] Public officials make decisions for the public employer. Thus, if the Legislature included within the public employer's discretion the power to allocate the employees' and public officials' share of the total annual costs, the elected officials may be tempted to favor themselves. The penultimate sentence removes this temptation by removing the public employer's discretion – public officials must pay 20% or more under MCL 15.564.

discretion in the penultimate sentence accentuates the extent of the discretion granted to the public employer in the final sentence.

Fourth, if the allocation of costs were held to be a mandatory subject of bargaining, then that holding would remove the employer's discretion, and subject its decision to bilateral negotiation. Such a holding would negate the "as it sees fit" language, which would conflict with the rule to avoid interpretations of a statute that render words or phrases nugatory. *Apsey*, 477 Mich at 127.

Further, it would impose a Sisyphean task to a public employer's implementation of Act 152.[14] The phrase "as it sees fit" confers independent managerial discretion regarding a decision that is within the public employer's core entrepreneurial control. See *Bay City Ed Ass'n v Bay City Pub Sch*, 430 Mich 370, 384; 422 NW2d 504, 510 (1988). It is clear that this subject is not amenable to the collective bargaining process.

Incredibly, neither the court of appeals nor the Commission addressed the plain language of MCL 15.564. Given the clear legislative mandate in the text of the statute, the Commission

[14] For example, negotiating over a public employer's decision to allocate the employee premium share under Act 152, Section 4 is a zero-sum game: a benefit to one bargaining unit entails an equivalent cost to another. Russell Korobkin, *Negotiation Theory and Strategy*, 128 (2d ed. 2009). Alternatively stated, the twenty percent employees' share under Section 4 of Act 152 is like a fixed pie. There is only so much to go around. Like the pie, the smaller premium share for one employee group necessarily correlates to a larger premium share for the other.

For the sake of argument, assume employees of the public employer are represented by only two bargaining units, Union A and Union B. Additionally, assume that both the collective bargaining agreements for Union A and Union B expire at the same time. Under the decision of the court of appeals, the public employer would be obligated to bargain to impasse with both Union A and Union B over its allocation of the 80/20 premium share set forth in Section 4. If public employer first bargained with Union A and the parties agreed that Union A's members would pay a 10% premium share, then Union B's members would be forced to pay a 30% premium share in order to ensure compliance with Section 4, assuming costs for the two plans were identical. Further, as in the above example, the court of appeals ignores that a public employer may have union employee groups that are both Act 312 eligible and non-Act 312 eligible bargaining units. Mandatory subjects of bargaining under PERA may be reviewed by an arbitration panel pursuant to the compulsory arbitration scheme set forth in Public Act 312 of 1969, as amended by Act 116 of 2011 ("Act 312"), MCL 423.231 *et seq.* *Metro Council No 23 & Local 1277, of Am Fedn of State, Co & Mun Employees (AFSCME) AFL-CIO v City of Ctr Line*, 414 Mich 642, 654; 327 NW2d 822 (1982). In accordance with the court of appeals' holding, the allocation of the employees' share under Section 4 for each medical benefit plan coverage year could be identified as an issue in dispute in an Act 312 Arbitration proceeding.

and court of appeals erred by avoiding the application of the plain language of this statutory exemption and, instead, holding that the allocation of these costs must be a mandatory subject of bargaining. Under *Ronnisch* and *Aspey*, the construing of a statute in a manner that renders words or phrases nugatory through judicial construction is prohibited. This is more significant where such construction, in fact, imposes the opposite obligation set forth by the text of the statute being construed and applied.

Accordingly, this Court should reverse the court of appeals where the plain language of MCL 15.564(2) grants public employers complete discretion to allocate their employees' contributive share. Just as the choice between implementing Section 3 or 4 of Act 152 is a permissive subject of bargaining, so too is the allocation of the medical benefit costs where the plain language of MCL 15.564(2) leaves such allocation to the public employer "as it sees fit."

B. *Act 152 diminishes PERA pro tanto*.

The court of appeals in *Van Buren*, 309 Mich App at 643, relied upon exclusively by the panel below at (**JA 490a**), recognized the overlap between Act 152 and PERA in the field of medical benefits for public employees. Despite its obiter dicta statements to the contrary,[15] there is a readily apparent conflict between Act 152 and PERA as to the allocation of the costs of medical benefit plans among public employees. Disposition of the conflict also supports reversal where Act 152 controls over PERA to the extent of any conflict.

[15] *Van Buren*, 309 Mich App at 648:

> Act 152 and PERA do not contain conflicting provisions as to collective bargaining rights. Rather, the statutes and their respective mandates can be read without conflict. As noted, Act 152 sets limits on the total costs a public employer may contribute toward its employees' medical benefit plans. The statute gives the employer a choice as to which limits to implement—the hard-caps option or the 80/20 plan. Once the employer makes that choice, nothing prohibits or prevents collective bargaining on the issue of health insurance contributions up to the limits imposed by the statute. Therefore, Act 152 and PERA do not conflict, and can be reconciled with one another.

The duty to bargain under PERA is statutory. *Amalgamated Transit Union, Local 1564, AFL-CIO v Se Michigan Transp Auth*, 437 Mich 441, 449; 473 NW2d 249 (1991). The rules of statutory construction apply to it the same as to every other statute. The court of appeals was incorrect in ruling that "PERA controls in any conflict with another statute." (**JA 490a**). While it is true that this Court has, on occasion, construed PERA "as the dominant law regulating public employee relations," those rulings were in context of construing PERA in relation to earlier enacted or more general statutes. *Rockwell v Board of Education of the School District of Crestwood*, 393 Mich 616, 629; 227 NW2d 736 (1975).

To this end, in enacting Act 152 the Legislature certainly was aware of collective bargaining under PERA or the arbitration of impasses under Act 312. Indeed, "the Legislature is held to be aware of the existence of the law in effect at the time of its enactments and that it would not engage in a wasteful effort of only repeating the work of a prior Legislature. *Malcolm v City of E Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991). This suggests that Act 152 created exceptions to PERA to the extent of any inconsistent overlap. "This is fortified by another well-noted principle of construction that a subsequently enacted specific statute is regarded as an exception to a prior general one, especially if they are in pari materia."[16] *Id.*

This conclusion is consistent with this Court's analysis of the interaction between the PERA and other Michigan statutes. In *Detroit Police Officers Ass'n*, this Court reconciled an apparent conflict between PERA and the Home Rule City Act ("HRCA"). 391 Mich at 65-70. There, the electors of the City of Detroit passed an amendment to its charter regarding the police retirement plan. The issue was whether the amendment of the city charter obviated the duty to bargain over retirement plans under PERA. *Id.* at 63. The Court agreed with the City of Detroit,

[16] Notably, the final clause of this quotation can also be read to mean that this principle of construction remains applicable even where two statutes are not expressly in pari materia.

"PERA contemplates open negotiations between the parties *unless controlled by a specific state law*," but the Court held that the HRCA was not a specific, controlling law. *Id*. at 66 (emphasis added). Instead, the HRCA contained merely a "general grant and outline of authority to a city government to implement and maintain a retirement plan." *Id*. at 66. Therefore, the Court held "substantive details of the retirement plan . . . are subject to the duty to bargain found in PERA." *Id*. at 67.

In *Civil Service Commission for the County of Wayne v Wayne County Board of Supervisors*, this Court could not harmonize a 1941 act regarding the civil service commission with the later enacted PERA. 384 Mich 363, 371-74; 184 NW2d 201 (1971). After finding a conflict between the statutes, this Court held that the later enacted statute repealed and controlled the former "to the extent of the repugnancy." *Id*. at 205 citing *Breitung v Lindauer*, 37 Mich 217, 233 (1877). Therefore, PERA diminished *pro tanto* "the original authority and duty of the plaintiff civil service commission." *Id*. at 374.

Likewise, in *Rockwell*, this Court held that PERA, *as the later enacted statute*, governed "to the extent of the conflict" with the Teacher Tenure Act. 393 Mich at 628. Moreover, the *Rockwell* Court interpreted Section 6 of PERA, which begins: "[n]otwithstanding the provisions of any other law." *Id*. The Court explained: "in enacting the PERA, the Legislature did not, apart from the 'notwithstanding the provisions of any other law' clause of Section 6, specifically provide that the PERA supersedes or replaces *existing laws* which arguably also govern public employee relations." *Id* at 629 (emphasis added).

This Court has never held that PERA supersedes a more specific and recently enacted law.[17] Here, Act 152 is a more specific and more recently enacted law. Since Act 152 is more recently enacted and more specific, it should govern over the PERA "to the extent of the repugnancy." *Civil Service*, 384 Mich at 205. The court of appeals in *Michigan State AFL-CIO v Michigan Employment Relations Com'n*, 212 Mich App 472, 487; 538 NW2d 433 (1995) aptly held, "[i]f the duty to bargain is imposed solely by statute, then the duty to bargain may be limited by statute." Act 152 is such a statute – the plain language of MCL 15.564(2) specifically exempts public employers from the general requirement under PERA to collectively bargain the allocation of medical benefit costs among its employees.

Accordingly, it was reversible error to hold that the allocation of costs under MCL 15.564(2) was a mandatory subject of bargaining.

II. The power to allocate the employees' share under Act 152 includes by necessity the power to calculate the employees' share.

The power to "allocate the employees' share of employees' share of total annual costs of the medical benefit plans among the employees" under Section 4 of Act 152 includes the power to calculate that share. Justice Cooley wrote, "where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred."[18] Justice Scalia and Bryan Garner describe this interpretive rule as the predicate-act canon, which means the authorization of an act also authorizes a necessary predicate act. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul:

[17] The Court of Appeals has expressly recognized this reality in several cases. E.g. *Kalamazoo Police Supervisor's Ass'n v City of Kalamazoo*, 130 Mich App 513, 525; 343 N.W.2d 601 (1983); *Irons v 61st Judicial Dist Court Employees Chapter of Local No 1645*, 139 Mich App 313, 321; 362 NW2d 262 (1984).

[18] Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (quoted from Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at p 192 (Thomson/West, 2012).

Thomson/West, 2012) at p 192.[19] To illustrate its application, Scalia and Garner quote a noted legal scholar writing in 1759:

> "[T]he vendee of all one's fishes in his pond may justify the coming upon the banks to fish, but not the digging of a trench to let out the water to take the fish, for he may take them by nets, and other devices; *but if there were no other means to take them, he might dig a trench*." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at p 192.

Importantly, this Court has also repeatedly affirmed the application of this canon of construction. See *City of Lansing v Edward Rose Realty, Inc*, 442 Mich 626, 634; 502 NW2d 638 (1993) ("Powers implied by general delegations of authority must be "essential or indispensable to the accomplishment of the objects and purposes of the municipality.") (Internal citations omitted).[20]

In this particular case, the Township's power to allocate total annual costs as it sees fit under MCL 15.564, includes the necessary predicate act of calculating the total annual costs. If the Township did not have the power to calculate, then it would not know the amount to allocate.

While Section 4 of Act 152 does not reference the term *calculate* anywhere within its text, the term *allocate* would subsume its meaning and application since the *calculation* of payments for medical benefit plan costs is incorporated into the *allocation* of the payments of the total annual costs for medical benefit plan costs. As such, where the allocation of the total annual costs of medical benefit plans is not a mandatory subject of bargaining, its predicate-act, "the calculation of such costs" is also not a mandatory subject of bargaining.

[19] **See Supplemental Appendix A (App 493a-497a)**.

[20] See also *Wright v Bartz*, 339 Mich 55, 59–60; 62 NW2d 458 (1954) (ruling that boards of supervisors have such implied powers and duties as are incident and necessary in the performance of their express powers and duties as provided under the governing statute); *Harvey v Crane*, 85 Mich 316, 322; 48 NW 582 (1891) (holding that the conveyance of a right of way gives to the grantee not only a right to an unobstructed passage at all times over defendant's lands, but also such rights as are incident or necessary to the enjoyment of such right of passage.);and, *Dries v. Chrysler Corp*, 402 Mich 78, 79; 259 NW2d 561 (1977) (power of Worker's Compensation Appeal Board to dismiss appeals for noncompliance with its rule requiring that appealing party file transcript within thirty days of filing of claim for review is necessarily implied from statute granting board authority to make rules on appellate procedure, in that power to dismiss is essential to enforcement of such procedural rules).

III. Act 152 does not preclude a public employer from using illustrative rates provided by its insurance company that consider the claims experience of retirees.

A. *Act 152 does not preclude the use of illustrative insurance rates that include retiree claims experience because Act 152 does not address the underlying methodology of calculating insurance premiums or illustrative rates*.

The Commission determined and the court of appeals affirmed that Act 152 precludes the use of illustrative rates that include retiree claims experience as an underlying calculation factor. However, Act 152 does not address the rate-calculation methodology used by insurance companies when calculating either premiums or illustrative rates.[21]

[21] The underlying methodology in calculating the illustrative rate was within the power of the insurance company, over which the Township lacked any influence when it implemented Act 152 on January 1, 2012. Cf *Ford Motor Co v NLRB*, 441 US 488, 503 (1979) (holding that the setting of food prices of a third-party vendor were "terms or conditions of employment" where the employer retained the power to control food prices of the third-party vendor.).

In fact, other statutes expressly regulate insurance rates and rate-calculation methodology, for example:

- Contract rates for a health maintenance organization must be "fair, sound, and reasonable in relation to the services provided, and the procedures for offering and terminating contracts must not be unfairly discriminatory." MCL 500.3519.
- The methodology used to determine rates charged by health maintenance organization and any changes to either the methodology or the rates "shall be filed and approved by the [commissioner of insurance] before becoming effective." MCL 500.3521(1).
- Health maintenance organizations "shall submit supporting data used in the development of a prepayment rate or rating methodology and all other data sufficient to establish the financial soundness of the prepayment plan or rating methodology." MCL 500.3521(2).
- The commissioner of insurance may disapprove rates charged by non-profit health care corporations (such as Blue Cross) if the "rates charged for the benefits provided is not equitable, not adequate, or excessive." MCL 550.1607.
- The repealed Public Acts of 108 and 109 of 1939 granted the commissioner of insurance the right to approve rates that were "fair and reasonable." See *Blue Cross and Blue Shield of Michigan v Demlow*, 403 Mich 399; 270 NW2d 845 (1978).

For more information on how Michigan regulates health insurance rates see "Health Coverage Reviews FAQ," *Department of Insurance and Financial Services*, <http://www.michigan.gov/difs/0,5269,7-303-13648_60666_77181---,00.html> (accessed March 30, 2017).

Statutes, however, are applied as a whole and do not govern subjects they do not address. Doing so would be similar to importing meaning into a statute not expressed within its text, which is impermissible. *Michigan Ed Ass'n v Secy of State*, 489 Mich 194, 218; 801 NW2d 35 (2011). Because Act 152 does not address insurance company rate-calculation methodology, Act 152 cannot be read to preclude insurance companies from bundling the claims experience of retirees with the claims experience of active employees when calculating illustrative rates for self-insured public employers. Consequently, Act 152 certainly does not prohibit public employers from relying on the illustrative rates provided by their insurance carriers.

Instead, however, the court of appeals held that Act 152 precludes the use of retiree claims experience in calculating illustrative rates because of the definition of "medical benefit plan" at MCL 15.562(e). (**JA 491a-JA 492a**). MCL 15.562(e) provides:

> "Medical benefit plan" means a plan established and maintained by a carrier, a voluntary employees' beneficiary association described in section 501(c)(9) of the internal revenue code of 1986, 26 USC 501, or by 1 or more public employers, that provides for the payment of medical benefits, including, but not limited to, hospital and physician services, prescription drugs, and related benefits, for public employees or elected public officials. *Medical benefit plan does not include benefits provided to individuals retired from a public employer* or a public employer's contributions to a fund used for the sole purpose of funding health care benefits that are available to a public employee or an elected public official only upon retirement or separation from service. (Emphasis added).

The court of appeals reasoned that because the definition of "medical benefit plans" excludes health care benefits provided to retirees, the Township could not use an illustrative rate that included the claims experience of retirees. (**JA 491a-JA 492a**).

But, the court of appeals misinterpreted this definition. The phrase "does not include benefits provided to individuals retired from a public employer" means that the Act 152 expenditure limits do not apply to employer-paid *retiree health care*. To wit, public employers'

payments toward retiree health care are not subject to Act 152's expenditure limits. This is so because Sections 3 and 4 of Act 152 both use the term "medical benefit plan" to define what is included within the class of expenditures applicable to respective contribution limitations. MCL 15.563(1) ("a public employer that offers or contributes to a medical benefit plan for its employees or elected public officials shall pay no more..."); MCL 15.564(2) ("a public employer shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers..."). Moreover, the Preamble to Act 152 confirms that the overall purpose of Act 152 is to "limit a public employer's expenditures for *employee* medical benefit plans." (Emphasis added). By excluding benefits provided to retirees from the definition of "medical benefit plan," the Michigan Legislature clarified that Act 152 restricts "employer's expenditures on *employee*" health plans - employer expenditures on *retiree* health plans are irrelevant.

The Department of Treasury, an agency charged by the legislature with administrative and enforcement authority of Act 152, MCL 15.569, agrees that Act 152 does not address the calculation of premiums or illustrative rates. The Department of Treasury interprets the exclusion of "benefits provided to individuals retired" from the definition of "medical benefit plans" to clarify that Act 152's spending limits apply only to expenditures for medical benefit plans for active employees. (**JA 268a**).[22] This interpretation of Act 152 is the only reasonable interpretation of Act 152 and is consistent with the statute's stated purpose.

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[22] See the Michigan Department of Treasury, *2011 Public Act 152: FAQs*, updated on April 3, 2015, p 7 <http://www.michigan.gov/documents/treasury/Public_Act_152_of_2011_FAQs_377180_7.pdf> (accessed March 30, 2017).

Q5-3. A public employer has retired employees that subscribe to the public employer health plan. Does the public employer need to consider the annual costs or illustrative rate and any payments paid by the public employer for reimbursement of health care costs paid for the benefit of the retiree when calculating their "hard cap" amounts under the provisions of Section 3 of the Act (MCL 15.563)?

A5-3. No. The Act directs in Section 2(e) (MCL 15.562(e)) that medical benefit plan means "...[a] medical benefit plan does not include benefits provided to individuals retired from a public employer."

To this end, for the purposes of enforcement of Act 152 under MCL 15.569, the Department of Treasury permits public employers to rely on the illustrative rates provided by their insurance company, even if they include claims experience of retirees. On August 28, 2013, the Michigan Department of Treasury opined in its answers to "Frequently Asked Questions" concerning Act 152, as follows:

> **Q7-24. A self-funded public employer receives one set of illustrative rates from its insurance carrier which is applicable to all of it active employees and its retired employees up to age 65 and their dependents. Is a public employer entitled to rely upon the illustrative rates provided by its insurance carrier in calculating whether it is over or under the "hard caps" in Section 3 of the Act (MCL 15.563) for its active employees, despite the fact that some of the illustrative rate is attributable to the claims experience of retirees and their dependents?**
>
> A7-24. Yes, the public employer can rely on the illustrative rate provided by its insurance carrier. The Act does not address how the illustrative rate is determined. The Act places limits on how much of that illustrative rate a public employer may pay in a medical benefit plan coverage year beginning on or after January 1, 2012, for its employees and elected public officials. (**JA 285a**).

The Department of Treasury has never rescinded its interpretation of Act 152. Indeed, this memorandum is still posted on its website at http://www.michigan.gov/treasury/0,4679,7-121-1751_2197_58826_63352-289841--,00.html as of March 31, 2017.

The Department of Treasury's interpretation of "medical benefit plan" is consistent with the text's plain meaning. When an agency is "charged with the duty of executing" a statute, this Court weighs that agency's interpretation with "respectful consideration." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008). Here, this Court should treat the Department of Treasury's interpretation with "respectful consideration" because it is

"charged with the duty [of] executing" Act 152 and its interpretation is consistent with the plain language of Act 152.[23]

Act 152 does not preclude the use of premiums or illustrative rates that are calculated to include the claims experience of retirees as a factor. The court of appeals erred where it held otherwise.

B. *Act 152, in conjunction with PERA, does not preclude the use of illustrative insurance rates that include retiree claims experience because PERA does not address the underlying methodology of calculating insurance premiums or illustrative rates*.

Similar to Act 152, PERA also does not address the underlying methodology of calculating premiums or illustrative rates.[24] At most, MCL 423.215b (1) provides:

> . . . after the expiration date of a collective bargaining agreement and until a successor collective bargaining is in place, a public employer shall and pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. . . . Employees who receive health . . . insurance benefits under a collective bargaining agreement shall bear any increased costs of maintaining those benefits that occur after the expiration date.

"Increased costs" is defined at MCL 423.215b(5)(b)[25] as "the difference in *premiums* or *illustrated rates* between the prior year and the coverage year. The difference shall be calculated based on changes in costs by category of coverage and not on changes in individual employee marital or dependent status." (Emphasis added). Stated simply, MCL 423.215b requires

[23] The court of appeals also erred when it held that the Commission had jurisdiction to interpret Act 152 through PERA. (**JA 491a**).

[24] Neither the court of appeals nor the Commission ruled that PERA precluded illustrative rates that include retiree claim experience. Rather, the express finding of an unfair labor practice on this issue derived from an apparent violation of Act 152. (**JA 313a**; **JA 491a**).

[25] Public Act 54 of 2011, MCL § 423.215b ("Act 54"), was an amendment to PERA, which was enacted on June 8, 2011. This section was later amended by 2014 PA 322, which did not substantively alter the cited sub-provision.

employees pay any increase in premiums or illustrative rates. MCL 423.215b certainly does not limit what *factors* insurance companies may or may not use to calculate illustrative rates.[26]

Because Act 152 and PERA lack prohibitions of any kind regarding the underlying methodology for calculating illustrative rates, the unfair labor practice charge must be dismissed where the court of appeals erred in the interpretation of MCL 15.562(e). Furthermore, this Court should clarify that the Department of Treasury is correct – Act 152 does not preclude the use of retiree claims experience in the underlying calculation of illustrative rates.

IV. The court of appeals erred by affirming the Commission's ruling that the Township had a unilateral obligation to recalculate and implement a new illustrative rate for purposes of the Act 152 calculation.

The court of appeals summarily affirmed, without discussion, the Commission's improper ruling that the Township committed an unfair labor practice when it failed to unilaterally recalculate the employees' premium share under Act 152.[27] Instead of addressing this argument raised by the Township, the panel improperly deemed it "abandoned" because it incorrectly believed the Township was challenging the Commission's authority under PERA to issue remedial orders. (**JA 491a-492a**). This is reversible error.

First, a matter is abandoned on appeal only if it is not addressed in a party's brief or argued at oral argument. See *Johns v Wisconsin Land & Lumber Co*, 268 Mich 675, 678; 256 NW 592 (1934). In this case, the issue was fully briefed and argued below. (**JA 355a-358a**). The court of appeals simply did not address the error raised by the Township.

[26] And nor would it, for it would be strange indeed if PERA, a statute that governs the relationship between employer and employee, would be concerned with third-party insurance companies computing insurance rates.

[27] To be clear, the Township is not disputing that the Commission has remedial authority to order a public employer to remediate the effects of an unfair labor practice.

Indeed, the record is clear that on January 1, 2012, when the Township implemented Act 152, it implemented the Act using the only illustrative rate available; the Blue Cross "bundled rate," which included active and retiree claims experience. (**JA 50a, Tr., p. 70:12-15**); (**JA 61a, Tr., pp. 116:19-117:9**). On January 6, 2012, the Union, for the first time, belatedly demanded to bargain over the "calculation method and total amount of the employee contributions." (**JA 76a**). By this time, however, the "bundled rate" had already been implemented.

On January 13, 2012, the parties met with a representative of Cornerstone Municipal Advisory Group to discuss various health care plans and premium share costs. (**JA 44a, Tr., pp. 47:25-48:11**). At this meeting, a handout was circulated which contained Blue Cross's "bundled" rates as implemented on January 1, 2012. It also included an unofficial, preliminary - non final calculation of "unbundled" rates that separated the claims experience of active from that of retired employees. (**JA 78a-83a**). It is undisputed, however, that these "unbundled" rates were not a usable rate to be implemented at that time.[28] (**JA 82a-83a; JA 62a, Tr., pp. 119:16-120:6**). Nonetheless, the Union filed an unfair labor charge alleging that the implementation of the "bundled" illustrative rate, prior to and without bargaining in good faith, violated Act 152 and, consequently, also constituted a violation of Sections 9, 10(e), and 15 of PERA. (**JA 7a-8a**).

On review, the Commission ultimately decreed that "…once the Respondent *was aware* of the unbundled illustrative rate, Respondent *had an obligation* to recalculate the employees' share of health care costs." (Emphasis added) (**JA 313a**). The Commission then held that "…Respondent *should have* recalculated the employee share *when it became aware* of the amount of the unbundled illustrative rate and *should have* properly credited employees for the

[28] At this time, Blue Cross was in the test phase of attempting to create a usable unbundled rate. (**JA 57a-58a, Tr., pp. 101:24-103:6**). The record is incomplete, however, because Blue Cross *never* provided official "unbundled" illustrative rates excluding retirees' claims experience.

overpayment." (Emphasis added) (**JA 315a**). In effect, the Township should have unilaterally implemented the revised illustrative rate. The Commission concluded that the failure to undertake such action unilaterally constituted an unfair labor practice. (**JA 313a-315a**).

This is contrary to well settled case law prohibiting any unilateral action by an employer affecting a mandatory subject of bargaining.[29] Specifically, if the Commission is correct that the calculation of the employee's premium share – in this case, the choice between implementing a bundled or unbundled illustrative rate – was a mandatory subject of bargaining, then any *recalculation* of the employees' premium share – in this case, switching from a bundled to an unbundled illustrative rate - would also be a mandatory subject of bargaining. To wit, the Township would have committed an unfair labor practice by unilaterally recalculating and implementing the employees' premium share using the draft unbundled illustrative rate.

It is well settled in Michigan that an employer cannot take unilateral action on a mandatory subject of bargaining. Whether a unilateral action improves benefits or reduces them, such action is impermissible under PERA if it is a mandatory subject of bargaining. See *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 567; 581 NW2d 707 (1998). Nonetheless, without citation or legal analysis, the Commission ruled that the Township had an obligation to unilaterally recalculate and then implement a revised illustrative rate – a subject that the Commission also expressly held was a mandatory subject of bargaining. (**JA 313a-315a**). This constitutes clear and material legal error.

Moreover, the Commission did not explain its departure from its own precedent. *See Melvindale-N Allen Park Fedn of Teachers, Local 1051 v Melvindale-N Allen Park Pub Sch*, 216

[29] The Township disputes that these subjects are mandatory subjects of bargaining as discussed in the preceding sections, but for the purpose of this sub-section, it assumes for the sake of argument that it was required to bargain over the calculation methodology associated with the illustrative rates it received from Blue Cross.

Mich App 31, 37-38; 549 NW2d 6 (1996).[30] If the Commission is opining that, under certain circumstances, an employer must take unilateral action on a mandatory subject of bargaining, it is reversing a long line of its own (and this Court's) precedent. The Commission, however, cannot change its precedent without an explanation for its reasoning. *Id*. Whether this newly created "obligation" is a change in the Commission's precedent is not clear. Certainly, its basis in law is unclear as it can neither be derived from prior Commission precedent nor from the text of Act 152. This error is further significant where the court of appeals affirmed the Commission's Decision and Order in its entirety, conferring precedential authority in all future labor relations disputes before the Commission. See, e.g. *AFSCME Council 25, Local 1583 Respondent-Appellee, v. James Yunkman, Glen Ford, and Fred Zelanka, Charging Parties-Appellants*, 28 MPER ¶ 80 (2015) ("the charging parties ... fail to adequately tackle the *MERC precedent relied on by the ALJ and the MERC* in disposing of this case").

The court of appeals' citation to the general powers of the Commission to enter remedial orders at *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 10; 753 NW2d 595 (2008) is inapposite and offers no basis for justifying the Commission's precedent defying ruling. In fact, there is nothing remedial about the Commission's ruling – it created an affirmative binding obligation on public employers to take unilateral action when complying with Act 152. The Commission specifically held that an unfair labor practice arose ***because*** the Township failed to unilaterally recalculate and implement the draft unbundled illustrative rate.

Under *St Clair*, 458 Mich at 567, the Commission exceeded its authority when it ruled that the Township had a unilateral obligation to recalculate and implement a revised illustrative

[30] *Melvindale* relies upon a line of National Labor Relations Board cases before the United States Supreme Court. This Court does not appear to have opined on the administrative process of agency departure from its own precedents.

rate. Public employers are not obligated to violate PERA by unilaterally attempting to comply with the Commission's interpretation of Act 152 in the absence of an order from the Commission or other court of law. Regardless of this Court's ruling on any other portion of this Appeal, this Court should also reverse the court of appeals and vacate the Commission's ruling on this issue and re-affirm that unilateral action on a mandatory subject of bargaining is impermissible regardless of whether the action improves or reduces employee benefits.

CONCLUSION AND RELIEF REQUESTED

This case is one of first impression arising from the Legislature's enactment Act 152. The allocation and calculation of the employee share of medical benefit plan costs under Act 152 is entirely within the employer's discretion, and thus is not a mandatory subject of bargaining. Moreover, Act 152 and PERA do not prohibit the use of retiree claims experience in calculating premiums or illustrative rates. Notwithstanding the other issues on appeal, it was reversible error for the Commission to hold that the Township committed an unfair labor practice because it did not take unilateral action to recalculate and implement a revised illustrative rate. The court of appeals should be reversed and the unfair labor practice charge be dismissed in its entirety.

WHEREFORE, Respondent/Appellant Shelby Township respectfully requests this Court reverse the Court of Appeals December 15, 2015 Opinion and Order in its entirety. Further, the Township requests this Court reverse the portions of the Commission's August 18, 2014 Decision and Order that found that the Township's actions were not permissible under Act 152 and in violation of PERA, and remand this matter to the Commission with instructions to dismiss the Unfair Labor Practice Charges of the Union in their entirety.

Respectfully submitted,

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Dated: March 31, 2017